

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NIKKI N. BOWEN,

Plaintiff,

v.

CAROLYN W COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. 3:15-CV-05385-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff Nikki N. Bowen filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of Plaintiff's applications for supplemental security income ("SSI") and disability insurance benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 6.

After considering the record, the Court concludes the Administrative Law Judge ("ALJ") erred by failing to discuss significant and probative evidence contained in the opinion of examining physician Dr. Raymond West. Had the ALJ properly considered Dr. West's opinion, the residual functional capacity ("RFC") may have included additional limitations.

ORDER REVERSING AND REMANDING
DEFENDANT'S DECISION TO DENY BENEFITS

1 The ALJ's error is therefore not harmless and this matter is reversed and remanded pursuant to
2 sentence four of 42 U.S.C. § 405(g).

3 LEAVE TO FILE AMENDED OPENING BRIEF

4 On February 2, 2016, Plaintiff filed an Unopposed Motion for Leave to File Amended
5 Opening Brief, attaching the Amended Opening Brief and a declaration from Plaintiff's
6 attorney, which states opposing counsel does not object to the Motion. Dkt. 16. After review,
7 Plaintiff's Motion is granted. The Opening Brief is stricken, and the Amended Opening Brief
8 will replace Plaintiff's Opening Brief.

9 FACTUAL AND PROCEDURAL HISTORY

10 On August 19, 2011, Plaintiff filed SSI and DIB applications, alleging disability as of
11 September 1, 2004. *See* Dkt. 9, Administrative Record ("AR") 10. The applications were
12 denied upon initial administrative review and on reconsideration. AR 10. A hearing was held
13 before ALJ David Johnson on July 11, 2013. *See* AR 27-74. At the hearing, Plaintiff amended
14 her alleged onset date to August 19, 2011. AR 10, 31. In a decision dated September 5, 2013,
15 the ALJ determined Plaintiff to be not disabled. *See* AR 10-21. Plaintiff's request for review of
16 the ALJ's decision was denied by the Appeals Council, making the ALJ's decision the final
17 decision of the Commissioner of Social Security ("Commissioner"). *See* AR 1-5; 20 C.F.R. §
18 404.981, § 416.1481.

19 Plaintiff alleges the ALJ erred by: (1) improperly rejecting the medical opinion
20 evidence by failing to (a) discuss all evidence included in the record and (b) properly consider
21 the opinions submitted by Dr. Raymond West, M.D., Dr. Norman Staley, M.D., and Dr. Drew
22 Stevick, M.D.; (2) giving insufficient reasons for finding Plaintiff lacked credibility; and (3)
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failing to properly assess Plaintiff's residual functional capacity ("RFC") and finding Plaintiff capable of working at Steps 4 and 5 of the sequential evaluation process. Dkt. 16-1, p. 2.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ improperly rejected the medical opinion evidence.

Plaintiff argues the ALJ erred by failing to consider probative treatment notes and properly weigh the medical opinions of Drs. Raymond West, Norman Staley, and Drew Stevick. Dkt. 16-1, pp. 3-8.

A. Treatment Notes

First, Plaintiff asserts the ALJ erred when he failed to discuss treatment notes discussing Plaintiff's impairments. Dkt. 16-1, p. 7. The ALJ "need not discuss all evidence presented." *Vincent ex rel. Vincent v. Heckler*, 739 F.3d 1393, 1394-95 (9th Cir. 1984). However, the ALJ "may not reject 'significant probative evidence' without explanation." *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent*, 739 F.2d at 1395). The "ALJ's written decision must state reasons for disregarding [such] evidence." *Flores*, 49 F.3d at 571.

The ALJ considered all the medical evidence when determining Plaintiff had severe impairments of Crohn's disease, status post colon resection, ileostomy, anemia, obesity, and asthma. *See* AR 12-14. The ALJ also discussed the medical evidence, including treatment

1 records and medical opinions, when determining Plaintiff was not entirely credible and in
2 limiting Plaintiff to sedentary work with limitations. AR 15-19.

3 In her Amended Opening Brief, Plaintiff detailed her treatment history, identifying
4 records which contain diagnoses of Plaintiff's alleged severe impairments and evidence of her
5 symptoms. *See* Dkt. 16-1, pp. 3-7. Plaintiff does not identify what medical records the ALJ
6 failed to discuss, nor explain the significance of the identified evidence. *Id.* Many of the
7 records predate Plaintiff's alleged onset date, and the records cited generally in the Amended
8 Opening Brief do not contain functional limitations or show Plaintiff was unable to work
9 during the alleged period of disability. *Id.* at pp. 3-6. Further, Plaintiff fails show how the
10 ALJ's alleged failure to discuss portions of the record is consequential to the RFC and the
11 ultimate disability determination. *See* Dkt. 16-1, p. 7; *Ludwig v. Astrue*, 681 F.3d 1047, 1054
12 (9th Cir. 2012) ("The burden is on the party claiming error to demonstrate not only the error,
13 but also that it affected his "substantial rights."); *Valentine v. Commissioner of Social Sec.*
14 *Admin.*, 574 F.3d 685, 692, n. 2 (9th Cir. 2009) (rejecting "any invitation to find that the ALJ
15 failed to account for [the claimant's] injuries in some unspecified way" when the claimant failed
16 to detail what limitations followed from the evidence beyond those already listed in the RFC).

17 Accordingly, the Court finds the ALJ properly considered the medical evidence and did
18 not err by failing to discuss unidentified evidence in the record. *See Houghton v.*
19 *Commissioner Social Sec. Admin.*, 493 Fed.Appx. 843, 845 (9th Cir. 2012) (finding the
20 plaintiff failed to show the ALJ was required to discuss a diagnosed impairment in the absence
21 of significant, probative evidence showing the impairment caused a functional impact or
22 restriction on the plaintiff's ability to work); *Burnaroos v. Colvin*, 2013 WL 546715, *4 (E.D.
23 Wash. Sept. 30, 2013) (finding the ALJ was not required to address records which were dated
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1 prior to the plaintiff's onset date and date she stopped using drugs because the evidence was
 2 neither significant nor probative).

3 B. Medical Opinion Evidence

4 Plaintiff next asserts the ALJ failed to properly consider the opinion evidence submitted
 5 by examining physician Dr. Raymond West and consulting physicians Drs. Norman Staley and
 6 Drew Stevick. Dkt. 16-1, pp. 7-8.

7 1. Dr. Raymond West

8 Plaintiff contends the ALJ erred by failing to properly consider examining physician
 9 Dr. Raymond West's opinion limiting Plaintiff to working "in a comfortable chair." Dkt. 16-1,
 10 p. 7.¹

11 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
 12 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th
 13 Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908
 14 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician's opinion is
 15 contradicted, the opinion can be rejected "for specific and legitimate reasons that are supported
 16 by substantial evidence in the record." *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53
 17 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The
 18 ALJ can accomplish this by "setting out a detailed and thorough summary of the facts and
 19 conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick*
 20 *v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751
 21 (9th Cir. 1989)).

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 23 ¹ Plaintiff also alleges the ALJ does not state any legitimate reason for rejecting Dr. West's uncontradicted
 24 findings. Dkt. 16-1, p. 7. But the only basis Plaintiff references is that the ALJ erred by failing to include the
 "comfortable chair" limitation in the RFC. Therefore, the Court will discuss only this limitation.

1 Dr. West examined Plaintiff on April 25, 2013. AR 1326-31. He opined Plaintiff is able
2 to stand and walk for up to five, possibly six, hours cumulatively in an eight-hour day,
3 providing she is able to take frequent and possibly prolonged breaks. AR 1330. Dr. West
4 opined, "In a comfortable chair, [Plaintiff] is able to sit for up to five or six hours cumulatively
5 in an eight-hour day providing she is able to move about for short periods from time to time."
6 AR 1330. He also found Plaintiff is able to lift and carry 15-20 pounds at least occasionally
7 and at least for a few steps. AR 1330-31.

8 The ALJ gave some weight to Dr. West's opinion. AR 19. As to Plaintiff's ability to sit,
9 the ALJ stated, "Dr. West further opined that the claimant would be able to sit for up to five or
10 six hours cumulatively in an eight-hour day, providing she would be able to move about for
11 short periods." AR 19. In the RFC assessment, the ALJ limited Plaintiff to sedentary work
12 "that allows her to occasionally change positions between sitting and standing[.]" AR 15.

13 Plaintiff challenges only the ALJ's failure to limit Plaintiff to sitting in a comfortable
14 chair, stating the ALJ failed to explain why the limitation was not included in the RFC. *See*
15 Dkt. 16-1, p. 7. The ALJ "may not reject significant probative evidence without explanation."
16 *Flores*, 49 F.3d at 570-71 (internal citations omitted). The ALJ did not discuss Plaintiff's need
17 to sit in a comfortable chair when explaining the weight given to Dr. West's opinion. Further,
18 while the ALJ gave some weight to Dr. West's opinion and included some of Dr. West's sitting
19 limitations in the RFC, he did not include a limitation regarding Plaintiff's need to sit in a
20 comfortable chair to be able to sit for five to six hours cumulatively in an eight-hour day. *See*
21 AR 15, 19.

22 Plaintiff's sitting limitations, including a workplace limitation regarding the type of
23 chair she needs, are related to her ability to be employed. Therefore, Dr. West's opinion
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1 regarding Plaintiff's ability to sit provided she has a comfortable chair is significant, probative
2 evidence. As the ALJ failed to provide any discussion regarding the limitation finding Plaintiff
3 requires a comfortable chair to sit for five to six hours, the Court cannot determine if the ALJ
4 properly considered this limitation or simply ignored the evidence. Accordingly, the ALJ erred
5 by failing to explain the weight given to Dr. West's opinion regarding Plaintiff's need to sit in a
6 comfortable chair.

7 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674
8 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
9 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*
10 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
11 F.3d at 1115. The determination as to whether an error is harmless requires a "case-specific
12 application of judgment" by the reviewing court, based on an examination of the record made
13 "'without regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at
14 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)). An ALJ's failure to discuss
15 a medical opinion is not harmless error. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012).
16 When the ALJ ignores significant and probative evidence in the record favorable to a claimant's
17 position, the ALJ "thereby provide[s] an incomplete residual functional capacity determination."
18 *Id.* at 1161.

19 Had the ALJ properly considered Dr. West's opinion as to Plaintiff's sitting limitations,
20 he may have included additional limitations in the RFC and in the hypothetical questions posed
21 to the vocational expert, Steve Duchesne. For example, if the RFC included a limitation that
22 Plaintiff must sit in a comfortable chair, Plaintiff may not be able to perform the jobs as
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1 identified by the vocational expert or the job bases may erode. Thus, the ultimate disability
2 determination may change, and the ALJ's error is not harmless and requires reversal.

3 2. Drs. Norman Staley and Drew Stevick

4 Plaintiff contends the ALJ failed to properly evaluate the medical evidence submitted
5 by Drs. Staley and Stevick. Dkt. 16-1, p. 8. Specifically, Plaintiff argues the ALJ erred when
6 he gave significant weight to the two opinions because the doctors failed to consider Plaintiff's
7 fatigue and anemia, need for a comfortable chair, need to move around from time to time, and
8 the number of times and length of time it takes for Plaintiff to change her ostomy bag. *Id.*
9 Plaintiff, however, does not cite to any medical evidence to support her position and relies only
10 on Plaintiff's subjective complaints to assert the ALJ erred by giving significant weight to the
11 opinions of Drs. Staley and Stevick. *See id.*

12 The ALJ is responsible for determining credibility and resolving ambiguities and
13 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
14 Determining whether inconsistencies in the medical evidence "are material (or are in fact
15 inconsistencies at all) and whether certain factors are relevant to discount" the opinions of
16 medical experts "falls within this responsibility." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169
17 F.3d 595, 603 (9th Cir. 1999)). It is not the job of the Court to reweigh the evidence: If the
18 evidence "is susceptible to more than one rational interpretation," including one supporting the
19 decision of the Commissioner, the Commissioner's conclusion "must be upheld." *Thomas v.*
20 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (*citing Morgan*, 169 F.3d at 599, 601).

21 Both Drs. Staley and Stevick opined Plaintiff was limited to sedentary work due to her
22 inflammatory bowel disease, anemia, and colostomy. AR 81, 85, 107, 110. They opined
23 Plaintiff should have easy, close access to the bathroom. AR 84, 108. The ALJ gave significant
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weight to the assessments, and stated the assessments took into account Plaintiff's Crohn's disease and management of her ostomy bag. AR 18. The ALJ further concluded the findings were consistent with the record as a whole and Plaintiff's demonstrated functioning. AR 18.

Plaintiff requests the Court reweigh the evidence and find Drs. Staley's and Stevick's opinions are entitled to little weight. *See* Dkt. 16-1, p. 8. However, the role of the Court is not to reweigh the evidence and arrive at an independent conclusion. *Smolen*, 80 F.3d at 1279. Drs. Staley and Stevick based their opinions on a review of Plaintiff's medical records, including Plaintiff's subjective reports. AR 77-86, 99-111. The ALJ reviewed the evidence and determined the opinions were entitled to significant weight. AR 18. After review of the record, the Court finds the ALJ's decision to give significant weight to the opinions of Drs. Staley and Stevick is supported by substantial evidence. Therefore, the ALJ did not err.

While the ALJ did not err in his decision to give significant weight to the opinions of Drs. Staley and Stevick, on remand, he must re-evaluate their opinions as necessitated by further consideration of Dr. West's opinion.

II. Whether the ALJ provided sufficient reasons for discrediting Plaintiff's testimony.

Plaintiff contends the ALJ erred by failing to provide clear and convincing reasons for finding Plaintiff not credible. Dkt. 16-1, pp. 8-16.

To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).

The ALJ "must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834.

1 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of
2 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning
3 symptoms, and other testimony that "appears less than candid." *Smolen v. Chater*, 80 F.3d
4 1273, 1284 (9th Cir. 1996). The ALJ may also consider if a claimant's complaints are
5 "inconsistent with clinical observations[.]" *Regennitter v. Commissioner of Social Sec. Admin.*,
6 166 F.3d 1294, 1297 (9th Cir. 1998).

7 Questions of credibility are solely within the control of the ALJ. *Sample v. Schweiker*,
8 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility
9 determination. *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may
10 not reverse a credibility determination where the determination is based on contradictory or
11 ambiguous evidence. *Id.* at 579.

12 Plaintiff testified she has trouble with her ostomy bag, which includes rashes, pain at
13 the bag site, and managing the bag's contents. *See* AR 16. Plaintiff experiences abdominal
14 discomfort and nausea during a flare. AR 16. She testified she applied for at least 80 jobs
15 during the three to four months prior to the ALJ hearing. AR 16. Plaintiff has been completing
16 online courses to become a medical assistant, but her laptop broke and she has been unable to
17 finish the program. AR 16. Plaintiff testified she could not work because she cannot work a
18 full eight-hour day, five days a week when she isn't feeling well. AR 52. Plaintiff also testified
19 she has abdominal pain, which requires pain medication. AR 47-48.

20 The ALJ found Plaintiff's impairments could be expected to cause some of her
21 symptoms. AR 15-18. However, the ALJ determined Plaintiff's "statements concerning the
22 intensity, persistence and limiting effects of these symptoms are not entirely credible" because
23 (1) Plaintiff is able to function at a greater level than alleged; (2) the record reflects Plaintiff's
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1 doctors repeatedly expressed concern about Plaintiff's noncompliance with treatment
2 recommendations; (3) there are inconsistencies between the evidence of record and Plaintiff's
3 testimony; (4) Plaintiff's testimony was inconsistent during the hearing; and (5) the treatment
4 records are inconsistent with Plaintiff's claim of anxiety. AR 16-18.

5 First, the ALJ found Plaintiff was not entirely credible because she was able to function
6 at a level greater than alleged. AR 16. The Ninth Circuit has recognized two grounds for using
7 daily activities to form the basis of an adverse credibility determination: (1) whether the
8 activities contradict the claimant's other testimony and (2) whether the activities of daily living
9 meet "the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
10 2007).

11 The ALJ found Plaintiff was able to complete online coursework to become a medical
12 assistant for eight hours a day for five months. AR 16. Plaintiff stopped only because her
13 computer broke. AR 16, 37-38. Plaintiff testified she was extensively applying for jobs, which
14 the ALJ found indicative of Plaintiff believing she is capable of working. AR 16, 51. Plaintiff
15 is also the primary caregiver for her children, aged seven and eleven at the time of hearing, and
16 babysat for a friend's child over long weekends in 2012. AR 16, 38, 40.

17 The ALJ noted Plaintiff was working twelve-hour shifts for ten days in a row near her
18 alleged onset date. AR 16. The ALJ found Plaintiff's schedule was very demanding and may
19 have exacerbated her symptoms; however, Plaintiff's work was more demanding than the work
20 contemplated by Drs. Staley and Stevick, who anticipated Plaintiff working eight-hour days,
21 five days a week. AR 16. While the ALJ recognized Plaintiff had an impairment which flares
22 at times, he found the credible limitations do not preclude work activity. The ALJ's conclusion
23 that Plaintiff is able to function at a level greater than alleged is a clear and convincing reason
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1 supported by substantial evidence for finding Plaintiff not entirely credible.

2 Second, the ALJ found Plaintiff not entirely credible because the record reflects
3 Plaintiff's doctors repeatedly expressed concern about Plaintiff's noncompliance with
4 treatment recommendations. AR 16. The Commissioner can find a claimant lacks credibility if
5 "the level or frequency of treatment is inconsistent with the level of complaints, or if the
6 medical reports or records show that the individual is not following the treatment as prescribed
7 and there are no good reasons for this failure." Social Security Ruling ("SSR") 96-7p, 1996
8 WL 374186, *7; *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40 (9th Cir. 2008)
9 (Where the "record reflects that [plaintiff] responded favorably to conservative treatment," yet
10 failed to seek aggressive treatment, such findings allowed the ALJ to make the "permissible
11 inference" that the plaintiff's symptom of pain "was not as all-disabling as he reported").

12 The ALJ found, in November 2011, Plaintiff was advised to consistently take her iron
13 supplement and Plaintiff's treating physician, Dr. Mark Cummings, listed noncompliance as
14 one of Plaintiff's chronic problems. AR 16, 17, 593, 1125, 1129, 1133, 1155, 1162, 1297. The
15 ALJ noted Plaintiff "no showed" three times at the Madigan GI clinic, and the treatment notes
16 indicate Plaintiff has a responsibility to show up to appointments and comply with treatment.
17 AR 17, 600. Dr. Cummings noted Plaintiff continued to smoke despite being told her Crohn's
18 disease medication, Humira, would be nothing more than a placebo if she smoked. AR 17, 600.
19 Additionally, Plaintiff continued to smoke and reported missing doses of her Humira. AR 17,
20 602, 606, 1119, 1276, 1287 ("noncompliance and smoking will both set [Plaintiff] up for
21 therapeutic failure").

22 Plaintiff argues the ALJ erred because he inferred Plaintiff could return to work if she
23 was compliant with her treatment and stopped smoking. Dkt. 16-1, pp. 10-11. The ALJ found
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1 Plaintiff's "failure to engage in, and follow through on, treatment recommendations,
2 undermines her credibility with respect to her claims that her condition is as bothersome and as
3 limiting as she has stated." AR 17. "[I]f a claimant complains about disabling pain but fails to
4 seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may use such
5 failure as a basis for finding the complaint unjustified or exaggerated." *Orn*, 495 F.3d at 638.
6 The ALJ did not find Plaintiff would be able to work if she complied with treatment and
7 stopped smoking. Rather, the ALJ found Plaintiff's noncompliance, failure to attend
8 appointments, and refusal to stop smoking showed Plaintiff's pain and symptoms were not as
9 bothersome as Plaintiff alleged. *See* AR 16-17. The Court finds the ALJ's decision finding
10 Plaintiff's noncompliance detracted from her credibility is supported by substantial evidence,
11 and is therefore upheld. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (upholding
12 ALJ discounting claimant's credibility in part due to lack of consistent treatment, and noting
13 the fact claimant's pain was not sufficiently severe to motivate her to seek treatment, even if
14 she had sought some treatment, was powerful evidence regarding extent to which she was in
15 pain).

16 Third, the ALJ found Plaintiff not entirely credible because there were inconsistencies
17 between her testimony and the record. AR 17. "In determining credibility, an ALJ may engage
18 in ordinary techniques of credibility evaluation, such as considering claimant's reputation for
19 truthfulness and inconsistencies in claimant's testimony." *Burch*, 400 F.3d at 680. Plaintiff
20 testified she did not think her doctors should have prescribed Humira and did not know why it
21 did not work. AR 17, 47-48, 54-55. In contrast, the ALJ found the record showed Plaintiff was
22 repeatedly told by Dr. Cummings smoking would nullify the effects of Humira. AR 17, 1276,
23 1287. In fact, Dr. Cummings instructed Plaintiff as early as February of 2009 through June of
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2012 that “the effects of nicotine will almost completely negate therapeutic benefits” of Humira. AR 845, 1154, 1287. Plaintiff also stated she did not want to be placed on Humira after her colon surgery, but ultimately did so because her doctor prescribed Humira. AR 17, 54. The ALJ noted Plaintiff’s testimony was inconsistent with records showing Plaintiff requested she be restarted on Humira. AR 17, 1150. Additionally, the ALJ found the medical records indicated Plaintiff was smoking well into 2013, after she testified she quit smoking on November 17, 2012. AR 17, 43, 1216, 1252, 1260, 1328. The inconsistencies between the record and Plaintiff’s testimony provides a clear and convincing reason for finding Plaintiff not entirely credible.

Fourth, the ALJ found Plaintiff not entirely credible because her testimony changed during the ALJ hearing. AR 17-18. Specifically, the ALJ found, after the vocational expert testified, Plaintiff exaggerated the length of time needed to change her ostomy bag. AR 17-18. Prior to the vocational expert testifying, Plaintiff testified it took her about seven to ten minutes to change her ostomy bag, but depending on the situation it could take up to 30 minutes to an hour. AR 53. After the vocational expert testified, Plaintiff stated it could take her anywhere from 30 minutes to an hour to change the bag. AR 72. The evidence is ambiguous regarding the amount to time it takes Plaintiff to clean, empty, or change her ostomy bag. As the evidence is ambiguous, the Court concludes the ALJ’s finding that Plaintiff exaggerated her condition after hearing the testimony of the vocational expert supports the credibility determination. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ properly discredited claimant’s testimony in part based on “her tendency to exaggerate”); *See Allen*, 749 F.2d at 579 (court may not reverse a credibility determination where that determination is based on contradictory or ambiguous evidence).

1 Fifth, the ALJ found Plaintiff not entirely credible because she complained of anxiety
2 and claimed to have been diagnosed with anxiety; however, treatment records were
3 inconsistent with this claim. AR 18. A determination that a claimant's complaints are
4 "inconsistent with clinical observations" can satisfy the clear and convincing requirement.
5 *Regennitter v. Commissioner of Social Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998). The
6 ALJ cites to several records showing the medical evidence does not contain claims of anxiety
7 and notes Plaintiff did not allege she had anxiety at the ALJ hearing. AR 18, 623, 673, 727-28,
8 807, 1013, 1139, 1153, 1270. Further, the ALJ found Plaintiff's credibility was diminished
9 because Plaintiff attempted to have a doctor write a note stating Plaintiff's dog was a service
10 dog for her alleged anxiety to avoid paying a security deposit. AR 18. Plaintiff's treating
11 provider refused to write the requested note because the dog was not a security dog and was
12 not needed for any of Plaintiff's medical conditions. AR 1257. *See Tidwell v. Apfel*, 161 F.3d
13 599, 602 (9th Cir. 1998) (an ALJ may consider motivation and the issue of secondary gain in
14 rejecting symptom testimony).

15 Plaintiff argues evidence showing she took Clonazepam, a drug which can be used for
16 anxiety, undermines the ALJ's findings. Dkt. 16-1, p. 12. Plaintiff testified she uses
17 Clonazepam as a sleep aid when her restless leg medication does not work. AR 50-51. She
18 testified she does not use the medication very often. AR 50-51. Further, the Clonazepam was
19 prescribed for Plaintiff's restless leg syndrome. AR 1250. Accordingly, the Court is not
20 persuaded by Plaintiff's argument and finds the ALJ's decision finding Plaintiff lacked
21 credibility because of her behavior surrounding her alleged anxiety is supported by substantial
22 evidence.

1 In conclusion, the ALJ gave five valid reasons for finding Plaintiff was not entirely
 2 credible. Accordingly, the ALJ did not err in his credibility determination. On remand, the ALJ
 3 need only reconsider Plaintiff's credibility as necessitated by further consideration Dr. West's
 4 opinion.

5 **III. Whether the ALJ erred in assessing Plaintiff's RFC and finding Plaintiff not**
 6 **disabled at Step 4 and Step 5 of the sequential evaluation process.**

7 Plaintiff next contends the ALJ erred in his assessment of Plaintiff's RFC and in his
 8 Step 4 and Step 5 analyses. Dkt. 16-1, pp. 16-19.

9 The Court concluded the ALJ committed harmful error when he failed to discuss a
 10 portion of Dr. West's opinion. *See* Section I(B)(1), *supra*. The ALJ must therefore reassess the
 11 RFC on remand. *See* Social Security Ruling 96-8p ("The RFC assessment must always consider
 12 and address medical source opinions."); *Valentine v. Commissioner Social Sec. Admin.*, 574 F.3d
 13 685, 690 ("an RFC that fails to take into account a claimant's limitations is defective"). As the
 14 ALJ must reassess Plaintiff's RFC on remand, he must also re-evaluate the findings at Step Four
 15 and Step Five to determine if Plaintiff can perform the jobs identified by the vocational expert in
 16 light of the new RFC. *See Watson v. Asture*, 2010 WL 4269545, *5 (C.D. Cal. Oct. 22, 2010)
 17 (finding the ALJ's RFC determination and hypothetical questions posed to the vocational expert
 18 defective when the ALJ did not properly consider a doctor's findings).

19 Although Plaintiff argues in a conclusory manner this matter should be remanded with a
 20 direction to award benefits, *see* Dkt. 16-1, p. 19, the Court concludes it would be inappropriate to
 21 do so because it is unclear if the ALJ would be required to find Plaintiff disabled if the
 22 improperly discredited evidence was credited as true. *See Garrison v. Colvin*, 759 F.3d 995,
 23 1020 (9th Cir. 2014) (*citing Ryan*, 528 F.3d at 1202).

CONCLUSION

Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is reversed and this matter is remanded pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings in accordance with the findings contained herein.

Dated this 22nd day of March, 2016.



David W. Christel
United States Magistrate Judge